No. 76-67

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

OCTA R. WHITELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a retired employee of the United States Department of Agriculture, brought this action in the Court of Claims seeking additional pay for her government service and additional retirement benefits. Petitioner claims that, because the government wrongfully classified various jobs she held and failed to grant hearings on her employment grievances, she was prevented from receiving additional promotions and retirement benefits to which she was entitled. The Court of Claims dismissed the petition on the ground that it failed to state a claim upon which relief could be granted.

1. Petitioner began work at the Department of Agriculture in May 1957, at civil service grade GS-2. She was promoted to GS-3 in August 1958 and to GS-4 in October 1966. In June 1969, the Department notified petitioner that as of August 31, 1969, she was subject to mandatory retirement because of age (CSC 375).[1]

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[1]"CSC" refers to the record before the Civil Service Commission.

Upon receipt of this notification, petitioner responded by questioning the accuracy of the date she had previously given as her birthdate and asserting that there were no records of her date of birth (CSC 373). Subsequently, she complained to an Equal Employment Opportunity counselor that she was being discriminated against because of her age (CSC 345-346). Petitioner thereafter wrote to the Administrator of the Department's Agricultural Stabilization and Conservation Service, enumerating 27 grievances (including allegations of improper discrimination) based on events that allegedly occurred from 1961 through 1968 (CSC 352, 354-371). At the same time, petitioner wrote to the Department's Director of Personnel, requesting a "desk audit of all employees to substantiate further" her various grievances (CSC 353).

In response to the Department's request for clarification of her allegations of discrimination (CSC 347), petitioner wrote that "[t]he discriminations were many, over the long period of time. They include sex, religion, age and political" (CSC 344).

The Department thereafter rejected petitioner's generalized discrimination complaint as untimely (CSC 341).

On petitioner's appeal, the Civil Service Commission affirmed, finding that "your allegation of discrimination based on sex and religion was untimely filed and that your allegation of discrimination in your retirement because of age was not within the purview of the anti-discrimination regulations" (CSC 316). The Commission, in February 1970, denied petitioner's requests to reopen her appeal (CSC 285, 304-305) and advised her that "any further remedies you may have are in the Judicial Branch of the Government" (CSC 285).

Almost five and one-half years later, in July 1975, petitioner instituted this action in the Court of Claims. That court ruled that petitioner's complaint failed to state a claim upon which relief could be granted, and it accordingly granted the government's motion for summary judgment and dismissed the action (Pet. App. A1-A3).

2. The decision of the Court of Claims is correct, and further review is not warranted.

This Court held in *United States* v. *Testan*, 424 U.S. 392, 403, that "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." That holding precludes relief on petitioner's complaint in the Court of Claims. As that court correctly stated (Pet. App. A1-A2):

> The gravamen of plaintiff's complaint is that due to defendant's conduct we should award a retroactive constructive promotion in this case. The short answer to this is that our power, if any, to grant promotions hinges upon legal entitlement to such a remedy based upon a statute or regulation. *Skrobot* v. *United States*, Ct. Cl. No. 338-74 (Slip Opin. Dec. 17, 1975); *Peters* v. *United States*, Ct. Cl. No. 470-73 (Slip Opin. Dec. 17, 1975); *Selman* v. *United States*, 204 Ct. Cl. 675, 686, 498 F. 2d 1354, 1359 (1974). Plaintiff's petition is not based upon such a statute or regulation.

The unavailability of relief in the Court of Claims in the nature of "retroactive reclassification resulting in money damages" (*United States* v. *Testan*, *supra*, 424 U.S. at 403) is not affected by the fortuity that petitioner, unlike the complaining parties in *Testan*, has already retired and therefore cannot seek "prospective reclassification" (*ibid.*). Nor can this case be distinguished from *Testan* on the ground that petitioner "claims, not a legal

right to a promotion, but a legal right to a hearing and determination of damages by denial of hearings" (Pet. 8). Even if, as petitioner contends, her due process rights had been violated by the alleged failure to grant hearings on her grievances, that would give her no right to relief in the Court of Claims, because the alleged due process violation cannot " 'in itself * * * fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*Testan*, *supra*, 424 U.S. at 402). See *Duarte* v. *United States*, 532 F. 2d 850, 852 and n. 3 (C.A. 2).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[2]An additional ground for dismissal of petitioner's action, not reached by the court below, is the doctrine of laches. This suit was filed in 1975, almost five and one-half years after the Civil Service Commission denied petitioner's requests to reopen the case and informed her that "any further remedies you may have are in the Judicial Branch of the Government" (CSC 285). In an affidavit filed below, the government demonstrated that petitioner's delay caused substantial prejudice to its ability to defend the suit in view of the dimming of memories and retirement of a number of potential government witnesses subsequent to the period of 1959 to 1969 when petitioner's grievances arose (Appendix Q to defendant's motion for summary judgment). The doctrine of laches constitutes an independent ground for dismissal of petitioner's suit. See *Grisham* v. *United States*, 183 Ct. Cl. 657, 392 F. 2d 980; *Gersten* v. *United States*, 176 Ct. Cl. 633, 364 F. 2d 850; *Alpert* v. *United States*, 161 Ct. Cl. 810.

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